
ARTICLES

EASEMENT CONDEMNATION AND *STATE V. DOYLE*: FAIR MARKET VALUE WITHOUT A MARKET

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I. INTRODUCTION

The law of many states, including Alaska, governing the exercise of the power of eminent domain by utilities and governmental agencies, often restricts the interest that may be acquired in land to a mere easement.¹ Similarly, a condemning agency typically receives only an easement when it uses private property without formally invoking its condemnation power and is forced to pay compensation to the landowner for such use under the doctrine of inverse condemnation.²

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1. Alaska and several states have an express, general limitation that an easement may be condemned for certain purposes such as utility lines. *See, e.g.*, ALASKA STAT. § 09.55.250 (1988); ARIZ. REV. STAT. ANN. § 12-1113 (1982); MONT. CODE ANN. § 70-30-104 (1987). In other states, the restriction is inferred from the principle, often embodied in state statute or constitution, that only so much property may be taken as is necessary for a public use. *See, e.g.*, *Hallock v. State*, 32 N.Y.2d 599, 605, 300 N.E.2d 430, 432, 347 N.Y.S.2d 60, 64 (1973), *rev'd on other grounds*, 64 N.Y.2d 224, 474 N.E.2d 1178, 485 N.Y.S.2d 510 (1984); *Westrick v. The Peoples Natural Gas Co.*, 103 Pa. Commw. 578, 581-82, 520 A.2d 963, 965-66 (1987). *See also* *City of New Ulm v. Schultz*, 356 N.W.2d 846, 848 (Minn. Ct. App. 1984) (city had to demonstrate that taking a fee interest in land was "reasonably necessary or convenient" for the expansion of an airport). This general principle has also been recognized in Alaska. *See Williams v. City of Valdez*, 603 P.2d 483, 491 (Alaska 1979).

2. *See United States v. Causby*, 328 U.S. 256, 267-68 (1946) (temporary or permanent nature of an avigation easement); *United States v. Cress*, 243 U.S. 316, 329 (1917) (easement for land flooded by government's dam); *Davis v. United States*, 295 F.2d 931, 934 (Ct. Cl. 1961) (avigation easement); *Barr v. KAMO Electric Corp.*, 648 S.W.2d 616, 619 (Mo. Ct. App. 1983) (easement for power line); *Cochran v. City of Charlotte*, 53 N.C. App. 390, 406, 281 S.E.2d 179, 191 (1981) (avigation easement).

Even where the type of estate in land to be taken is left to the discretion of the condemning agency, easements are often taken rather than a broader estate such as a fee simple.³ An easement is the right of one person to use another's real property for a specific purpose.⁴ It is to be distinguished from the fee simple interest, which provides a person with the maximum control over the disposition and use of real estate.⁵ It may be further distinguished from the leasehold which grants the tenant the right to full enjoyment, possession and use of land for a term.⁶

The compensation mandated by state and federal constitutions which condemnors must pay for the interests they acquire is typically, but not always, said by the courts to be measured by an objective test relying on "fair market value."⁷ While there are markets for the fee or leasehold interests, however, there is no market for an easement.⁸ The judicial response to this circumstance, most recently illustrated in Alaska in *State v. Doyle*,⁹ has been the development of a "before and after" test and appraisal technique which calculates compensation as the difference between the value of the original parcel before the easement has been imposed and the value after that interest is taken.¹⁰

3. See, e.g., *United States v. 64.88 Acres of Land*, 244 F.2d 534, 536 (3d Cir. 1957); *United States v. Kansas City*, 159 F.2d 125, 129 (10th Cir. 1946); *United States v. 40.81 Acres of Land*, 505 F. Supp. 151, 152 (E.D. Pa. 1981); *Department of Pub. Works and Bldgs. v. Bozarth*, 101 Ill. App. 2d 99, 101, 242 N.E.2d 54, 55 (Ct. App. 1968); *Minneapolis Gas Co. v. Dahle*, 285 Minn. 166, 170-71, 171 N.W.2d 813, 815-16 (1969); *Missouri Pub. Serv. Co. v. Argenbright*, 457 S.W.2d 777, 784 (Mo. 1970).

4. *Freightways Terminal Co. v. Industrial & Commercial Constr., Inc.*, 381 P.2d 977, 982 (Alaska 1963). See generally 3 R. POWELL, *THE LAW OF REAL PROPERTY*, ¶ 405 (P. Rohan rev. ed. 1989); *RESTATEMENT OF PROPERTY* § 450 (1944) [hereinafter *RESTATEMENT*].

5. See, e.g., *State ex rel. Ervin v. Jacksonville Expressway Auth.*, 139 So. 2d 135, 138 (Fla. 1962); *Sterner v. Nelson*, 210 Neb. 358, 368, 314 N.W.2d 263, 269 (1982). For characteristics of the fee, see generally 2 R. POWELL, *THE LAW OF REAL PROPERTY*, ¶¶ 179, 190 (P. Rohan rev. ed. 1988); *RESTATEMENT*, *supra* note 4, §§ 14, 15. Where the use authorized by the easement is so exclusive as to leave the owner of the remaining estate with little meaningful interest in the land, the distinction has proved difficult to make. Cf. *St. Louis County v. St. Appalonia Corp.*, 471 S.W.2d 238, 246-48 (Mo. 1971); *Cappelli v. Justice*, 262 Or. 120, 127-30, 496 P.2d 209, 212-13 (1972). The fee simple estate in turn takes several distinct and well-known forms, see generally 2 R. POWELL, *Id.* ¶¶ 190[1] - 190[2]; *RESTATEMENT*, *supra* note 4, §§ 14-26, but these further distinctions are irrelevant to the issues addressed here.

6. See, e.g., *Town of Kearny v. Municipal Sanitary Landfill Auth.*, 143 N.J. Super. 449, 455-60, 363 A.2d 390, 393-96 (1976). See generally 2 R. POWELL, *supra* note 5, ¶ 221[3][a]; *RESTATEMENT*, *supra* note 4, § 450 comment d.

7. See text *infra* at Section II.A and notes 17-19.

8. See text *infra* at Section IV and notes 57-59.

9. 735 P.2d 733 (Alaska 1987).

10. See text and notes *infra* at Sections IV and V.

The deficiencies of this approach, which are apparent in *Doyle*, and a proposed legislative solution are the subject of this article.

II. CURRENT LEGAL FRAMEWORK

A. Formal Condemnation

The nature and extent of the estate taken in the exercise of eminent domain power depends upon the statute conferring the power.¹¹ The relevant Alaska statute permits the condemnor to take a fee simple interest only for public buildings, grounds, reservoirs and dams and permanent flooding occasioned thereby, a place for the deposit of debris or mine tailings and, when necessary in the judgment of the Department of Natural Resources or the Department of Transportation and Public Facilities, for departmental purposes.¹² The condemnor may acquire only an easement for any other purpose for which condemnation is authorized, including, *inter alia*, telephone, sewer, electric and natural gas utility facilities.¹³ The general rule is that only the estate reasonably necessary for the accomplishment of the purpose for which the property is taken may be acquired through condemnation and compensation.¹⁴ The policy is to require neither the landowner to relinquish, nor the taxpayers to pay for, more than is necessary.¹⁵ Accordingly, statutes authorizing condemnation are construed strictly against the condemnor.¹⁶

The compensation which the United States Constitution and state constitutions require to be paid to the landowner is normally equated with fair market value, or "the market value of the property at the time of the taking."¹⁷ Fair market value is defined as "the amount of money 'which a purchaser willing but not obliged to buy the property would pay to an owner willing but not obliged to sell it, taking into

11. *Williams v. City of Valdez*, 603 P.2d 483, 491 (Alaska 1979).

12. ALASKA STAT. § 09.55.250(1) (1988).

13. Compare ALASKA STAT. § 09.55.240 (1988) with ALASKA STAT. §§ 09.55.250-(1)-(2) (1988).

14. See *supra* note 1.

15. *Williams*, 603 P.2d at 491 & n.24 (citing 3 J. SACKMAN, NICHOLS ON EMINENT DOMAIN § 9.2[2], at 9-17 to 9-18 (1978 & 1979 Supp.)).

16. *Williams*, 603 P.2d at 491; *Laurel, Inc. v. Commissioner of Transp.*, 180 Conn. 11, 31, 428 A.2d 789, 798 (1980), and cases cited in 3 J. SACKMAN, NICHOLS ON EMINENT DOMAIN § 9.2[1] n.15 (P. Rohan rev. 3d ed. 1985 & Supp. 1989).

17. *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984) (quoting *Olson v. United States*, 292 U.S. 246, 255 (1934)); *Gackstetter v. State*, 618 P.2d 564, 567 (Alaska 1980). See also *Department of Transp. v. Nalven*, 455 So. 2d 301, 307 (Fla. 1984); *Andrews v. City of Greenbelt*, 293 Md. 69, 76, 441 A.2d 1064, 1069 (1982); *State v. Silver*, 92 N.J. 507, 513, 457 A.2d 463, 466 (1983); *Township of Chester v. Commonwealth*, 495 Pa. 369, 373, 433 A.2d 1353, 1356 (1981). See generally 4 J. SACKMAN, NICHOLS ON EMINENT DOMAIN § 12.2 (P. Rohan rev. 3d ed. 1985 & Supp. 1989).

consideration all uses for which the land was suited and might in reason be applied.'"¹⁸ This test is favored because it is said to be objective.¹⁹ Departure from the fair market value test is required under the fifth amendment only when market value cannot accurately or reasonably be determined, or when its application would result in manifest injustice to the owner or the public.²⁰ Though no other test has been applied in Alaska, the Alaska Supreme Court has suggested the standard might be abandoned if it resulted in less than full indemnification to the landowner for a taking.²¹

B. Inverse Condemnation

"Inverse condemnation" is a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when formal condemnation proceedings have not been instituted.²² The United States Supreme Court has described it as a "cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency."²³ The taking can result from physical invasion of the land resulting from governmental activities²⁴

18. *Gackstetter*, 618 P.2d at 565 n.2 (quoting 4 J. SACKMAN, NICHOLS ON EMINENT DOMAIN § 12.2[1] (P. Rohan 3d ed. 1979)). *Accord* *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511-13 (1979); *United States v. 760.807 Acres of Land*, 731 F.2d 1443, 1446 (9th Cir. 1984); *United States v. 1,291.83 Acres of Land*, 411 F.2d 1081, 1084 (6th Cir. 1969); *United States v. 104 Acres*, 666 F. Supp. 1017, 1020 (W.D. Mich. 1987); *State v. 7.026 Acres*, 466 P.2d 364, 365 (Alaska 1970); *Wronowski v. Redevelopment Agency*, 180 Conn. 579, 585, 430 A.2d 1284, 1287 (1980); *Wright v. Metropolitan Atl. Rapid Transit Auth.*, 248 Ga. 372, 375, 283 S.E.2d 466, 469 (1981); *City of Elko v. Zillich*, 100 Nev. 366, 370, 683 P.2d 5, 8 (1984). See generally 4 J. SACKMAN, *supra* note 17, § 12.2[1].

19. See *United States v. 50 Acres of Land*, 469 U.S. 24, 35-36 (1984) (alternate method of compensation, equal to the cost of acquiring a substitute facility, was too subjective); *Gackstetter*, 618 P.2d at 567.

20. *Kirby Forest Indus. v. United States*, 467 U.S. 1, 10 n.14 (1984) (citation omitted).

21. *State v. Doyle*, 735 P.2d 733, 736-37 n.4 (Alaska 1987); *Babinec v. State*, 512 P.2d 563, 570 (Alaska 1973); *Ketchikan Cold Storage Co. v. State*, 491 P.2d 143, 150-51 (Alaska 1971).

22. *Kirby Forest*, 467 U.S. at 5 n.6; *Brazil v. City of Auburn*, 93 Wash. 2d 484, 490-91, 610 P.2d 909, 912-13 (1980).

23. *United States v. Clarke*, 445 U.S. 253, 257 (quoting D. HAGMAN, URBAN PLANNING AND LAND CONTROL DEVELOPMENT LAW 328 (1971) (emphasis deleted)).

24. See *Kirby Forest*, 467 U.S. at 5 (citing *United States v. Dow*, 357 U.S. 17, 21-22 (1958), and *United States v. Dickinson*, 331 U.S. 745, 747-49 (1947)); *Bakke v. State*, 744 P.2d 655 (Alaska 1987) (state's logging operation damaged landowner's property); *City of Anchorage v. Nesbett*, 530 P.2d 1324 (Alaska 1975) (city refused to

or from an incursive regulation promulgated in exercise of police powers.²⁵ Once liability is established, compensation rules applicable to formal condemnation cases are followed.²⁶

The question of what interest, if any, the governmental defendant obtains in the property once liability has been established is often treated as an afterthought in the reported cases. When the invasion is physical, some courts require the landowner to convey an interest to the condemnor upon receipt of compensation. This interest will be an easement unless the landowner has established that he has lost all value of the property, in which case a fee simple may be conveyed.²⁷ Alternatively, some courts simply order the agency to institute formal condemnation procedures,²⁸ which, as previously discussed,²⁹ will limit the rights which the agency can acquire. In either case, the landowner will be compensated for the value of the property interest taken.³⁰ The appropriate remedy for a regulatory taking is more controversial, but usually requires invalidation of the challenged regulation, thereby forcing the government either to initiate formal condemnation proceedings to take the property or to revise the regulation to make it less restrictive.³¹

remove power lines from landowner's property); *State v. Crosby*, 410 P.2d 724 (Alaska 1966) (state appropriated land for a highway).

25. See, e.g., *Agins v. Tiburon*, 447 U.S. 255, 260-61 (1980); *Penn Central Trans. Co. v. New York City*, 438 U.S. 104, 123-28 (1978); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982).

26. See *Kirby Forest Indus. v. United States*, 467 U.S. 1 (1984).

27. See, e.g., *Davis v. United States*, 295 F.2d 931, 934 (Ct. Cl. 1961); *Salton Bay Marina v. Imperial Irrigation Dist.*, 172 Cal. App. 3d 914, 962-63, 218 Cal. Rptr. 839, 868-69 (Ct. App. 1985); *Harris v. L.P. and H. Constr. Co.*, 441 S.W.2d 377, 381 (Mo. Ct. App. 1969); *Balken v. Town of Brookhaven*, 70 A.D.2d 579, 579, 416 N.Y.S.2d 51, 52 (1979); *Cochran v. City of Charlotte*, 53 N.C.App. 390, 406-07, 281 S.E.2d 179, 191 (Ct. App. 1981). But see *Town of East Haven v. Eastern Airlines*, 470 F.2d 148, 150-51 (2d Cir. 1972), *cert. denied*, 411 U.S. 965 (1973); *Steiger v. City of San Diego*, 163 Cal. App. 110, 117, 329 P.2d 94, 98 (Ct. App. 1958); *Commonwealth v. Gisborne*, 391 S.W.2d 714, 716 (Ky. Ct. App. 1965). In the latter three cases, damages were awarded but the property owners did not convey formal easements.

28. See, e.g., *Spaeth v. City of Plymouth*, 344 N.W.2d 815, 822 (Minn. 1984); *State ex rel. McCormick v. Miller*, 297 S.E.2d 448, 450 (W. Va. 1982).

29. See text *supra* at Section II.A and notes 11-16.

30. See, e.g., *Davis v. United States*, 295 F.2d 931, 933-34 (Ct. Cl. 1961); *Salton Bay Marina v. Imperial Irrigation Dist.*, 172 Cal. App. 3d 914, 963-64, 218 Cal. Rptr. 839, 869-70 (Ct. App. 1985).

31. See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 308-09 (1987); *Q.C. Constr. Co. v. Gallo*, 649 F. Supp. 1331, 1335 (D.R.I. 1986), *aff'd*, 836 F.2d 1340 (1st Cir. 1987). *First English* further requires that compensation be paid to the landowner for any temporary loss he may have suffered before the regulation was invalidated. 482 U.S. at 321.

III. *STATE V. DOYLE*

*State v. Doyle*³² involved claims by owners of residential properties located in the overflight path of a new runway at Anchorage International Airport that their properties had been damaged by noise resulting from use of the runway.³³ The superior court awarded substantial compensation to the landowners on the theory that an avigation easement over the properties had been inversely condemned, and the state appealed the decision.³⁴ The state contended that the landowners had not established that the value of their properties had been diminished by the aircraft noise and that the mere slowing of the rate of appreciation in the properties' values which the landowners claimed had resulted from the noise did not require compensation from the state.³⁵ The state also challenged, as clearly erroneous, the superior court's findings that the landowners' experts were "competent appraisers," and that those experts' conclusions that the properties suffered compensable damages in particular amounts should be given "substantial weight" in determining the compensation award.³⁶ The court, rejecting all of the state's contentions, affirmed the superior court's award.³⁷

The court considered it "established that the proper measure of damages in an eminent domain proceeding in Alaska is the difference in the fair market value of the property before and after the taking."³⁸ It noted, however, that just compensation required by article I, section 18 of the Alaska Constitution³⁹ "implies full indemnification to the owner for the property taken."⁴⁰ The court, relying on decisions from California and Washington,⁴¹ then held that a claim for loss of appreciation of property is compensable if that appreciation could have been realized at the time of taking, had the taking not occurred.⁴²

The court then turned to the lower court's findings and conclusions. The lower court had entered a conclusion of law that compensation was required even when the properties showed no decrease in

32. 735 P.2d 733 (Alaska 1987).

33. *Id.* at 734.

34. *Id.* at 735.

35. *Id.*

36. *Id.* at 738.

37. *Id.* at 743.

38. *Id.* at 735.

39. ALASKA CONST. art. I, § 18.

40. *Doyle*, 735 P.2d at 736 (quoting *Ketchikan Cold Storage Co. v. State*, 491 P.2d 143, 150 (Alaska 1971)).

41. *Id.* at 736-37 (citing *Steiger v. City of San Diego*, 163 Cal. App. 2d 110, 329 P.2d 94 (Ct. App. 1958); *Highline School Dist. No. 401 v. Port of Seattle*, 87 Wash. 2d 6, 548 P.2d 1085 (1976)).

42. *Id.* at 737.

value after the taking,⁴³ but then entered a finding of fact that the landowners' appraisers were of the opinion that the properties had diminished in value as of the taking date.⁴⁴ The Alaska Supreme Court interpreted the finding of fact to mean that the properties had diminished in value relative to comparable properties outside the area impacted by the noise⁴⁵ and found support for the finding in the appraisal testimony.⁴⁶ One of the landowners' appraisers opined that the impacted properties appreciated at a rate of only 13.7% compared to a rate of 16% for comparable non-impacted properties.⁴⁷ This testimony was also found to support the lower court's finding that the properties had "suffered compensable damage" totalling \$488,000.⁴⁸ Over the state's objection that there was no relationship, mathematical or otherwise, between the difference in appreciation rates and the damages awarded, the court found the award supported by the evidence, noting that the rates were trends or averages from which the actual appreciation of the properties involved might differ significantly.⁴⁹

IV. THE "BEFORE AND AFTER" MEASURE OF COMPENSATION

The "before and after" method of computing damages for easement acquisitions is widely accepted and employed.⁵⁰ Though rarely noted, the test requires the parties, their appraisers and the trier of fact to engage in an elaborate fiction:

43. *Id.* at 735 n.2.

44. *Id.* at 738 (quoting Finding No. 34).

45. *Id.* at 738 n.8.

46. *Id.* at 738.

47. *Id.*

48. *Id.* at 739.

49. *Id.*

50. *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 630, 632 (1961). *See also* *Olson v. United States*, 292 U.S. 246, 253 (1934); *United States v. 8.41 Acres of Land*, 680 F.2d 388, 392 (5th Cir. 1982), *cert. denied*, 479 U.S. 820 (1986); *United States v. 1,138.15 Acres of Land*, 441 F. Supp. 433, 433, 434 (W.D. Okla. 1977); *Redevelopment Agency of Concord v. Tobriner*, 153 Cal. App. 3d 367, 372, 200 Cal. Rptr. 364, 367 (Ct. App.), *cert. denied*, 469 U.S. 882 (1984); *Louisville Gas & Elec. Co. v. Scott*, 563 S.W.2d 746, 747 (Ky. Ct. App. 1978); *Colonial Pipeline Co. v. Gimbel*, 54 Md. App. 32, 38, 456 A.2d 946, 950 (1983); *Arkansas Louisiana Gas Co. v. Cable*, 585 P.2d 1113, 1115 (Okla. 1978); *Canyon View Ranch v. Basin Elec. Power Corp.*, 628 P.2d 530, 541 (Wyo. 1981). *See generally* 4 J. SACKMAN, *supra* note 17, § 12.41[2] (stating the "before and after" test as the method "normally" used and discussing avigation easements specifically). Arkansas appears to be the only jurisdiction with a different rule, namely, that the landowner is entitled to the full fair market value of the area encompassed by the easement plus any damages to the remainder tract. *See* *Arkansas Louisiana Gas Co. v. Cates*, 10 Ark. App. 426, 428-29, 664 S.W.2d 897, 898 (1984). Louisiana employs a method whereby the easement is valued as a percentage of the fee value of the land, the percentage determined by the extent of the allowed uses, and the highest and best use of the servient land. *See* *Dixie Elec. Membership Corp. v. Watts*, 268 So. 2d 128, 132 (La. Ct. App. 1972).

[T]he market value of the property before and after the imposition or taking is used as the measure of loss or damage. This question is, how does the easement affect the market price of the property? Here again we have the willing and intelligent buyer and seller, neither acting under compulsion. They agree upon a price before the easement is imposed. But before the sale is closed the easement is imposed. They meet again, both willing to deal on the basis, of course, of the fair market value. But the situation is changed in one particular — the imposition of the easement or easements. The question is, how does the changed situation affect the market price? The willing prospective buyer examines the instrument creating the outstanding easement as to its terms, whether it is perpetual; to what extent does it limit the use of the servient estate, and what are the maximum uses granted by the instrument? All in all, how much less valuable do the outstanding easements make the whole property?⁵¹

To place this test in perspective, it is helpful to compare it with methods for valuing the fee. The appraisal approach most favored by the courts for valuation of the fee is the "market data," or "sales comparison" approach.⁵² That method infers a value for the property in issue (the "subject") by analyzing sales of comparable properties.⁵³ First, the actual prices at which the properties have been sold are adjusted for differences in time, location and other physical characteristics from a theoretical sale of the subject.⁵⁴ The subject's value is then derived from a reconciliation of these adjusted values.⁵⁵ The critical difference between these two methods of appraisal is that the fee value is inferred directly from data derived from a market for that particular interest while the "before and after" technique indirectly infers the value of the easement acquired from its impact on the value of another type of interest, namely, the fee simple. Both processes involve a great deal of subjectivity, but the "before and after" test is one step further away from objective data than is valuation of the fee.

An easement acquired by a public agency is normally for a specific purpose, such as construction of a pipeline, that is uniquely within the authority of the public agency.⁵⁶ This limited right has no

51. *United States ex rel. TVA v. Indian Creek Marble Co.*, 40 F. Supp. 811, 821 (E.D. Tenn. 1941).

52. J. EATON, *REAL ESTATE VALUATION IN LITIGATION* 137 (1982).

53. AM. INST. OF REAL ESTATE APPRAISERS, *THE APPRAISAL OF REAL ESTATE* 311 (9th ed. 1987) [hereinafter AM. INST.]; J. EATON, *supra* note 52, at 137.

54. AM. INST., *supra* note 53, at 316-17; J. EATON, *supra* note 52, at 145.

55. AM. INST., *supra* note 53, at 339; J. EATON, *supra* note 52, at 159.

56. See Angers, *Valuation of Pipeline Servitudes*, 40 APPRAISAL J. 114, 118 (Jan. 1972); Carll, *Valuation of Transmission Line Rights of Way*, AM. INST. OF REAL ESTATE APPRAISERS, *CONDEMNATION APPRAISAL PRACTICE* 264 (1961). See also *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624 (1960) (flowage easement condemned for reservoir construction).

utility to others and probably will be useful to the acquiring agency only if assembled, for example, with other similar rights on other parcels along the route of the pipeline.⁵⁷ A real estate market, however, presupposes multiple buyers and sellers of items which are approximate substitutes for one another.⁵⁸ Easements, therefore, cannot be considered to be traded in a market or have market value in and of themselves.⁵⁹ The absence of a market value for easements necessitates the "before and after" rule as the substitute measure of compensation.⁶⁰

Condemnors, of course, frequently are able to negotiate the acquisition of easements without resort to court proceedings.⁶¹ These sales might initially seem to constitute a "market," with the prices paid for the easements establishing a data base for reference in determining the value of a comparable easement. Nearly all jurisdictions, however, including Alaska, hold that evidence of sales even of fee interests to a condemnor is not relevant to prove the value of a similar acquisition.⁶² Such sales are thought to be tainted by the spectre of litigation that may induce the landowner to accept less or the agency to pay more than the value of the land in order to avoid the cost and headache of formal condemnation litigation.⁶³ Since the participants in such a transaction are not "willing but not obliged to"⁶⁴ make the sale, one of the defined preconditions for a fair market sale is not met.⁶⁵ Any inference from such sales about the fair market value of another acquisition is therefore so problematic that the courts simply refrain from basing awards on this method of calculation.

57. *Olson v. United States*, 292 U.S. 246, 256-58 (1934). See Angers, *supra* note 56, at 118.

58. See AM. INST., *supra* note 53, at 35-36.

59. Carll, *supra* note 56, at 264.

60. See *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 633-35 (1960); *Olson v. United States*, 292 U.S. 246, 257 (1934).

61. The United States Department of Transportation reported that in calendar year 1986, for example, 90 to 95% of the tracts needed for federal-aid highway projects through the Federal Highway Administration were obtained by the state department of transportation through negotiation at the administrative or pre-trial level. O.R. Colan Associates, Inc., APPRAISAL FEDERAL INELIGIBILITY NOTIFICATION STUDY (April 24, 1987) (prepared for the Florida State Department of Transportation).

62. *Alaska State Housing Auth. v. DuPont*, 439 P.2d 427, 429 (Alaska 1968); see generally 5 J. SACKMAN, NICHOLS ON EMINENT DOMAIN § 21.33 (P. Rohan rev. 3d ed. 1985 & Supp. 1989) (citing numerous authorities supporting rule).

63. See *Alaska State Housing*, 439 P.2d at 429 (stating that such sales are considered involuntary). See generally 5 J. SACKMAN, *supra* note 62, § 21.33.

64. *Gackstetter v. State*, 618 P.2d 564, 565 n.2 (Alaska 1980) (quoting 4 J. SACKMAN, NICHOLS ON EMINENT DOMAIN § 12.2[1] (P. Rohan 3d ed. 1979)).

65. See *supra* note 18 and accompanying text.

V. THE APPRAISAL OF EASEMENTS

While the appraisal of real estate in general has been described as an inexact science,⁶⁶ the application of the "before and after" test to a particular easement is an especially difficult task for an appraiser.⁶⁷ There are several approaches to this test, each varying in degree of practicability.

A. Sales Comparison

The most straightforward application of the test is to employ the sales comparison method. As applied to assess the amount of a negative adjustment to the value of a subject parcel of property, the approach is sometimes called the paired data set analysis.⁶⁸ This method requires the appraiser to locate sales of properties that are subject to an easement similar to the one in issue and then to find sales of the same or similar properties without such an easement.⁶⁹ The appraiser then adjusts the prices indicated for those transactions to account for any differences other than the presence of the easement and calculates the differences between the adjusted prices for pairs of properties.⁷⁰ The appraiser concludes by reviewing the amounts of the differences and forming an opinion on the amount of negative adjustment to market value of the properties attributable to the easement.⁷¹ Finally, he applies this negative adjustment to the value of the subject parcel without the easement.⁷² The difference between the unadjusted and adjusted values ("before and after") is the required just compensation. This method is reliable because the negative adjustment for the subject easement must bear at least some relation to the negative adjustments computed from objective data, the paired sales.

The chief problem with the paired sales method is that it can rarely be employed practically. First, actual transactions involving comparable properties with and without easements frequently do not exist.⁷³ Second, the cost of the research necessary to find the data often is far in excess of the resources that the condemnor and the landowner are willing and able to expend.⁷⁴ Third, the cost of the research

66. *Ketchikan Cold Storage Co. v. State*, 491 P.2d 143, 151 (Alaska 1971).

67. J. EATON, *supra* note 52, at 264.

68. See AM. INST., *supra* note 53, at 324-25.

69. See *id.* (describing a general paired data set analysis).

70. See *id.*

71. *Id.* at 325-29.

72. See *id.*

73. AM. INST., *supra* note 53, at 325; Dempsey, *The DUPA Technique for Electric Transmission-line Easement Acquisitions*, 49 APPRAISAL J. 382, 382 (July 1981); Hennessy, *Right of Way Appraisal Practice*, 14 VALUATION 57, 60 (Fall 1965).

74. See, e.g., J. EATON, *supra* note 52, at 264-65 (discussing nominal damages caused by easements).

far exceeds the amount of compensation which reasonably is anticipated to be found by the study.⁷⁵

In connection with the second and third points above, it is important to note that a great many easement acquisitions involve significantly less damages than the amount claimed by plaintiffs' appraisers in *Doyle*.⁷⁶ This is illustrated by the Alaska case of *Scavenius v. City of Anchorage*,⁷⁷ in which the plaintiff condemned easements for the construction, use and maintenance of a sanitary sewer line.⁷⁸ Before trial, a court-appointed master had awarded just compensation of \$516.00 for the taking.⁷⁹ At trial, the city's appraiser testified that there had been no impact on the market value of the property and the jury awarded no compensation.⁸⁰ The Alaska Supreme Court found the decision to be supported by the evidence,⁸¹ but failed to respond decisively to the question of whether the failure to award any compensation violated the landowner's constitutional rights.⁸²

When just compensation is non-existent or particularly low, appraisal costs become very significant relative to the size of the award. Moreover, the landowner in Alaska is further deterred from obtaining his own appraisal by special procedural rules that limit his right to be reimbursed for costs he incurs in the proceedings.⁸³ When the condemned property is worth too little to warrant an appraisal, appraisal costs are deemed not "necessary" and will not be awarded to the landowner.⁸⁴

An additional problem with the paired sales method is the possible overriding impact on property value of factors other than the easement. Frequently, the appraiser must make adjustments for other factors influencing property values that have a much greater impact on

75. *See id.*

76. *See, e.g., id.* at 264-65 (discussing nominal damages from easements generally); Butler, *A New Look at Partial Takings*, 50 APPRAISAL J. 591, 593 (Oct. 1982) (no before and after differences from transmission line easements found); Rhodes, *Air Rights, Subsurface Easements and Other Fractional Interests*, 42 APPRAISAL J. 261, 271 (Apr. 1974) (no damage to remaining farmland by electrical transmission line easements).

77. 539 P.2d 1161 (Alaska 1975).

78. *Id.* at 1162.

79. *Id.*

80. *Id.* at 1162-63.

81. *Id.* at 1167.

82. *Id.* at 1165.

83. *Stewart & Grindle, Inc. v. State*, 524 P.2d 1242, 1249-51 (Alaska 1974) (construing ALASKA R. CIV. P. Rule 72(k)). *See State v. Alaska Continental Dev. Corp.*, 630 P.2d 977 (Alaska 1980); *Badger Constr. Co. v. State*, 628 P.2d 921 (Alaska 1981).

84. *Stewart & Grindle*, 524 P.2d at 1250. The "prevailing party" doctrine in Alaska, which awards costs in civil litigation, is not applicable in condemnation proceedings. *See City of Anchorage v. Scavenius*, 539 P.2d 1169, 1175-76 (Alaska 1975).

prices than the presence or absence of an easement.⁸⁵ The amount by which the prices are adjusted for a factor such as time may exceed vastly that portion of the price differential attributable to the easement. Put another way, the difference in value allegedly attributable to the presence of the easement may be nothing more than imprecision in the manner in which the raw prices were adjusted for more significant influences.

B. Income Approach

A second method of applying the "before and after" test focuses on the ability of the subject parcel to earn income.⁸⁶ An appraiser's testimony with respect to this factor has been accepted as evidence of the diminution in value attributable to an electric transmission line easement in *City of Anchorage v. Nesbett*.⁸⁷

In *Nesbett*, the technique was applied to undeveloped land by first positing a structure or improvement on the land which would represent its highest and best use.⁸⁸ The appraiser then estimated the annual market rent which that improvement could be expected to produce.⁸⁹ Dividing that figure by an estimated market rate of return produced a capitalized value for market rent, representing the amount that a theoretical investor interested solely in income would pay for the property.⁹⁰ The appraiser then considered what effect the imposition of the easement would have on the hypothetical improvement.⁹¹ Potential impacts include complete elimination of the feasibility of building the structure, reduction in the structure's size or increases in the cost of developing the structure. The impact in *Nesbett* was that the size of the hypothetical structure was reduced.⁹² After determining the effect of the easement, the appraiser must then estimate the value of the servient parcel in the same fashion indicated above.⁹³

It could be argued at this juncture that the difference between the two land values as indicated by income capitalization is the value of the easement. This difference, however, is between the value of the land and a hypothetical building before and after the easement has

85. See AM. INST., *supra* note 53, at 325.

86. For discussion of the income approach to valuation generally, see AM. INST., *supra* note 53, at 407-26; J. EATON, *supra* note 52, at 116-35.

87. 530 P.2d 1324, 1334 (Alaska 1975). See also *United States v. 104 Acres*, 666 F. Supp. 1017, 1022 (W.D. Mich. 1987) (easement for noninterference with radio signal).

88. *Nesbett*, 530 P.2d at 1332 n.24.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. See text *supra* at Section V.B and notes 88-91.

been imposed. To provide a meaningful figure for the actual parcel of land, the appraiser must be able to relate the difference to the unimproved land. The appraiser in *Nesbett* proceeded to derive a ratio between the before and after values which reflected the percentage of depreciation caused by the easement.⁹⁴ He then applied the ratio to the value of the fee simple interest in the unimproved land (as determined by the sales comparison method) to arrive at a value of that land after imposition of the easement.⁹⁵ The difference between the "after" value and the fair market value of the land represented his opinion of just compensation.⁹⁶

Income capitalization is now generally recognized by appraisers as an acceptable means of valuing fee interests or leaseholds.⁹⁷ If the parcel containing the easement produces income and the easement can be shown to directly affect that income stream, just compensation could be estimated by dividing the reduction in net income attributable to the easement by the capitalization rate. While the capitalization rate is always an approximation, reliable sources of market data exist for estimating it.⁹⁸ The reduction of net income, however, can only be found in market data by comparing market rents or incomes from paired data sets of properties with and without the easement. As indicated previously, paired data sets are rarely available.⁹⁹

In this writer's experience though, easements rarely directly impact income either by reducing gross income or by increasing expenses, and the reported cases contain few examples where such an impact was found.¹⁰⁰ And where, as in *Nesbett*, an income producing use for the property must be hypothesized, the approach becomes quite fanciful. While hypothetical use of property must often be postulated in order that property may be valued at its highest and best use, the *Nesbett* approach requires two such hypothetical improvements, one without the easement imposed and the other with it. Moreover, a comparison of these two structures does not yield the amount of just compensation but rather only a ratio to be applied to the value of the unimproved land. At this point, the method becomes far removed from any objective market data.

94. *Nesbett*, 530 P.2d at 1332.

95. *Id.*

96. *Id.*

97. See AM. INST., *supra* note 53, at 408-09, 420-23; J. EATON, *supra* note 52, at 116.

98. See AM. INST., *supra* note 53, at 472-78.

99. See *supra* text at Section V.A and accompanying notes 73-75.

100. *United States v. 104 Acres*, 666 F. Supp. 1017 (W.D. Mich. 1987), appears to be one instance where such impact was found. The court there did not capitalize the difference in income attributable to the easement, however, but used the income approach to assist it in determining property values before and after the taking.

C. The Deductive Percentage

The limitations of the paired sales and income approaches have led to a recurring paradox. These techniques frequently enable the appraiser to say only that the difference in the before and after values of the property is not measurable or, more affirmatively, that there is no difference.¹⁰¹ Such a conclusion is intuitively unsatisfactory. The condemnor values the easement highly enough to attempt to negotiate its acquisition and, if necessary, to commence judicial proceedings. At the same time, however, the compensation indicated by appraisal is zero or nominal. Cases like *Scavenius* are the result.

This paradox may be responsible for a common practice in the appraisal of easements. Some appraisers will simply state an opinion that the value of the fee interest has been diminished by a given percentage.¹⁰² This percentage is then multiplied by the value of the fee interest in the land affected by the easement to produce just compensation.¹⁰³ Often the appraiser offers only his experience or judgment as justification for the percentage selected.¹⁰⁴ Such a practice cannot be considered as an objective or scientific measurement; rather it is a conclusion reached *a priori* without reference to any data base. Since the practice appears to be grounded in some unarticulated general notion of what is fair, the approach will be generously described herein as the deductive percentage method. It might also be given another label: speculation.

D. Judicial Acceptance of Easement Valuation Testimony

The difficulty and uncertainty inherent in determining the impact of an easement on the value of land justifies greater judicial scrutiny of valuation testimony than might be exercised in cases involving fee takes. Three evidentiary limitations are implicated. First, the requirement of Rule 701 of both the Alaska and Federal Rules of Evidence that lay opinion testimony be limited to that which is rationally based

101. See J. EATON, *supra* note 52, at 264.

102. The practice is noted and discouraged in L. CLARK & F. TREADWAY, IMPACT OF ELECTRIC POWER TRANSMISSION LINE EASEMENTS ON REAL ESTATE VALUES 16 (1972); G. SCHMUTZ, CONDEMNATION APPRAISAL HANDBOOK 211-12 (1963); Angers, *supra* note 56, at 122. It is unwittingly illustrated in Siemers, *The Value of Pipe Line Easements*, APPRAISAL DIGEST at 11, 14 (July-Sept. 1969); Webb, *Appraisal of Rights of Way and Easements*, ENCYCLOPEDIA OF REAL ESTATE APPRAISING 752 (E. Friedman 3d ed. 1978).

103. See sources cited *supra* note 102.

104. See the testimony of the landowner's expert in *Miller v. State*, 117 Misc. 2d 444, 451, 458 N.Y.2d 973, 978 (Ct. Cl. 1982); *Texas Elec. Serv. Co. v. Wheeler*, 551 S.W.2d 341, 342 (Tex. 1977).

on the perception of the witness¹⁰⁵ would normally be expected to exclude lay valuation testimony where an easement is taken. Lay witnesses are unlikely to be familiar with the methodologies described above for rationally determining the valuation impact of an easement and, hence, less likely to make rational comparisons of similar properties. In addition, since there is no true market for easements, the lay witness cannot form an opinion based on his observation or familiarity with such a market.¹⁰⁶ Second, lay and expert testimony must be scrutinized carefully to determine whether it actually assists the trier of fact in calculating just compensation.¹⁰⁷ Appraisal testimony which in essence is based on the deductive percentage approach fails to meet this test as it is founded on the appraiser's notion of fairness rather than on data or knowledge generally unavailable to a typical juror. Third, courts should be particularly attentive in easement cases to the rule that expert testimony is inadmissible if grounded in speculation.¹⁰⁸ The income approach to valuing easements should be subject to careful scrutiny under this rule in light of its speculative nature.

The reported cases, however, do not distinguish between easement and fee takings in applying evidentiary rules and only minimally scrutinize appraisal testimony in any context, whether fee or easement. Thus, the well established rule that the lay landowner is competent to

105. FED. R. EVID. 701; ALASKA R. EVID. 701.

106. Where an easement and the servient property are sufficiently similar to those in the instant case, lay testimony from participants in a sale of such property may assist the trier of fact. The impact of the easement on the participants in the bargaining process would be probative. Testimony regarding this impact technically would not constitute opinion testimony, but rather direct evidence about a comparable sale transaction. Direct evidence about a comparable sale transaction is admissible to prove market value. *See, e.g., Oglethorpe Power Corp. v. Seasholtz*, 157 Ga. App. 723, 724, 278 S.E.2d 429, 430 (Ct. Cl. 1981); *Taylor v. City of Des Moines*, 337 N.W.2d 881, 883 (Iowa Ct. App. 1983). *See generally* 5 J. SACKMAN, NICHOLS ON EMINENT DOMAIN § 21.3[1] (P. Rohan rev. 3d ed. 1985 & Supp. 1989).

107. *See* FED. R. EVID. 702(a) (allowing the testimony of expert witnesses only if such testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue"). *Accord* ALASKA R. EVID. 702(a).

108. FED. R. EVID. 703; ALASKA R. EVID. 703. As to expert testimony generally, *see, e.g., Johnson v. Serra*, 521 F.2d 1289, 1293 (8th Cir. 1975), *aff'd*, 586 F.2d 1291 (8th Cir. 1978); *American Bearing Co. v. Litton Indus.*, 540 F. Supp. 1163, 1172-73 (E.D. Pa. 1982), *aff'd*, 729 F.2d 943 (3rd Cir.), *cert. denied*, 469 U.S. 854 (1984); *Fletcher v. Department of Roads*, 216 Neb. 342, 351, 344 N.W.2d 899, 904 (1984); *Leon, Ltd. v. Carver*, 104 N.M. 29, 35, 715 P.2d 1080, 1086 (1986). As recognized specifically in condemnation of fee interests, *see, e.g., United States v. 0.161 Acres*, 837 F.2d 1036, 1040 (11th Cir. 1988); *United States v. 341.45 Acres*, 633 F.2d 108, 111 (8th Cir. 1980), *cert. denied*, 451 U.S. 938 (1981); *Washington Metro Area Trans. Auth. v. One Parcel of Land*, 450 F. Supp. 122, 126-27 (D. Md. 1978); *Tandet v. Urban Redevelopment Comm'n*, 179 Conn. 293, 300, 426 A.2d 280, 284 (1979); *Dawson v. Papio Natural Resources Dist.*, 206 Neb. 225, 232-33, 292 N.W.2d 42, 47 (1980).

testify about the value of his own property¹⁰⁹ is construed broadly to allow the landowner to testify about the impact of an easement on the value of his property.¹¹⁰ With respect to expert appraisal opinion, some courts have adopted a rule in easement and fee takings allowing the appraiser, once qualified, to offer his opinion as testimony, with the

109. See *United States v. 79.20 Acres of Land*, 710 F.2d 1351, 1357 (8th Cir. 1983); *Gasser v. United States*, 14 Cl. Ct. 476, 507 (1988); *State v. Compton*, 502 So. 2d 1205, 1207-08 (Ala. 1987); *Coffelt v. Arkansas State Highway Comm'n*, 285 Ark. 314, 318, 686 S.W.2d 786, 788 (1985), *cert. denied*, 479 U.S. 1090 (1987); *State Dep't of Highways v. Pigg*, 656 P.2d 46, 49 (Colo. Ct. App. 1982); *Georgia Power Co. v. Bishop*, 162 Ga. App. 122, 124-25, 290 S.E.2d 328, 331 (Ct. App. 1982); *City of Freeport v. Fullerton Lumber Co.*, 98 Ill. App. 3d 218, 222, 423 N.E.2d 924, 928 (Ct. App. 1981); *Brannon v. State Roads Comm'n of State Highway Admin.*, 305 Md. 793, 801, 506 A.2d 634, 638-39 (1986); *City of Elko v. Zillich*, 100 Nev. 366, 371, 683 P.2d 5, 8 (1984); *Responsible Citizens v. City of Asheville*, 308 N.C. 255, 270-71, 302 S.E.2d 204, 214 (1983); *Redevelopment Auth. of Harrisburg v. Young Women's Christian Ass'n*, 44 Pa. Commw. 295, 298-99, 403 A.2d 1343, 1345-46 (1979); *Arkansas Louisiana Gas Co. v. Allison*, 620 S.W.2d 207, 209 (Tex. Civ. App. 1981). *But see* *Department of Transp. v. Kirk*, 138 Ga. App. 180, 181, 225 S.E.2d 781, 782 (Ct. App. 1976) (An owner may not testify to the value of his goods in a single or gross amount without giving his reasons therefor, or else showing that he has had an opportunity for forming a correct opinion.); *Department of Highways v. Fister*, 373 S.W.2d 720, 722-23 (Ky. 1963) (The qualifications of the owner witness, as with other witnesses, must be affirmatively shown before his opinion of market values is expressed.); *Pankauski v. Greater Lawrence Sanitary Dist. Comm'n*, 13 Mass. App. 929, 930, 430 N.E.2d 1228, 1230 (App. Ct. 1982) (The question, however, of whether an owner has sufficient knowledge to permit him to testify as to the value of his own property, is a preliminary question of fact to be decided by the trial judge, whose decision is conclusive unless upon the evidence it was erroneous as a matter of law.); *Lustig v. U.M.C. Indus.*, 637 S.W.2d 55, 60-61 (Mo. Ct. App. 1982) ("An owner of real estate may testify regarding his opinion of its value, even though he is not an expert in such matters, since an owner is presumed to be familiar with the property and its uses; but, if the record shows the owner does *not* have special knowledge, the presumption is overcome and evidence of his opinion of the value of the property should be rejected."); *Utah Dep't of Transp. v. Jones*, 694 P.2d 1031, 1036 (Utah 1984) (holding that ownership of property alone is not sufficient to qualify the owner as an expert on the "highest and best use" of the property).

110. See, e.g., *Board of Directors v. Calvaresi*, 156 Colo. 173, 177, 397 P.2d 877, 879 (1964); *Georgia Power Co. v. Bishop*, 162 Ga. App. 122, 123-24, 290 S.E.2d 328, 331 (Ct. App. 1982); *Missouri Pub. Serv. Co. v. Allied Mfrs., Inc.*, 574 S.W.2d 509, 512 (Mo. Ct. App. 1978). See also *Continental Pipe Line Co. v. Irwin Livestock Co.*, 625 P.2d 214, 217 (Wyo. 1981) (testimony of president of corporation owning land as a value of parcel admitted but insufficient because it did not value land before and after easement). *But see* *Smith v. Potomac Elec. Power Co.*, 236 Md. 51, 60, 202 A.2d 604, 609 (1964) (president of corporation owning land not permitted to testify as owner); *Arkansas Louisiana Gas Co. v. Allison*, 620 S.W.2d 207, 209-10 (Tex. Civ. App.), *modified on other grounds*, 624 S.W.2d 565 (Tex. 1981) (landowner could not testify to mere conclusion as to market value but must show nature of damage, effect on parcels and relationships of same to market value).

reasoning and logic behind it going to the weight rather than the admissibility of the testimony.¹¹¹ Other courts require a minimal showing of the rationality of the opinion before such testimony will be admitted.¹¹² Courts specifically addressing the deductive percentage approach in valuing easements are divided over its admissibility.¹¹³ The Alaska Supreme Court has adopted a general policy in condemnation cases of "liberal and flexible" admission of appraisal testimony.¹¹⁴ The court justifies this policy by emphasizing that the appraisal of real estate is an inexact science, and that therefore each party must be afforded "latitude" in presenting evidence with respect to compensation.¹¹⁵

VI. DOYLE: JUDICIAL IMPOTENCE

The combined impact on the integrity of the easement condemnation process of the "before and after" rule, the limitations of appraisal methods and the judicial deference to appraisal opinions is glaringly apparent in *Doyle*. Though the testimony of the various appraisers is mentioned only briefly in the decision,¹¹⁶ the central appraisal problem in the case was to extract the value impact of an avigation easement

111. See, e.g., *State v. Dillingham Corp.*, 60 Haw. 393, 411, 591 P.2d 1049, 1060 (1979); *Texas Elec. Serv. Co. v. Wheeler*, 551 S.W.2d 341, 343 (Texas 1977). See also *Department of Transp. v. Pilgrim*, 175 Ga. App. 576, 579-80, 333 S.E.2d 866, 870 (1985) (noting that the credibility and weight of appraisal opinion is determined by the jury). See generally Comment, *Real Estate Valuation in Condemnation Cases — The Place of the Expert*, 43 NEB. L. REV. 137 (Dec. 1963).

112. See *United States v. 77,819.10 Acres*, 647 F.2d 104, 108 (10th Cir. 1981), cert. denied, 456 U.S. 926 (1982) (opinions must have rational foundation to be probative); *United States v. 97.19 Acres*, 582 F.2d 878, 882-83 (4th Cir. 1978) (expert may arrive at opinions in any way a man of intelligence would have arrived at a valuation of the property for business purposes); *Arkansas-Missouri Power Co. v. Sain*, 262 Ark. 326, 327-28, 556 S.W.2d 441, 442 (1977) (an expert's opinion testimony must have a sound and reasonable basis); *Dawson v. Papio Natural Resources Dist.*, 206 Neb. 225, 233, 292 N.W.2d 42, 47 (1980) (where the opinion testimony of an expert witness does not have a sound and reasonable basis it should be stricken); *Nasco, Inc. v. Director of Pub. Works*, 116 R.I. 712, 721, 360 A.2d 871, 876 (1976) (an expert's opinion based solely on the witness's experience in evaluating property, without detailing any specific reasons or factors, is entitled to no weight).

113. Compare *Texas Elec. Serv. Co. v. Wheeler*, 551 S.W.2d 341, 342-43 (Texas 1977), with *Miller v. State*, 117 Misc. 2d 444, 450-51, 458 N.Y.S.2d 973, 978 (1982). See also cases dealing with fear of utility facilities as basis of expert conclusion of diminished value: *Arkansas Louisiana Gas Co. v. Cable*, 585 P.2d 1113 (Okla. 1978); Annotation, *Fear of Powerline, Gas or Oil Pipeline, or Related Structure as Element of Damages in Easement Condemnation Proceeding*, 23 A.L.R. 4th 631 (1983).

114. *Dash v. State*, 491 P.2d 1069, 1076 (Alaska 1971). See also *Babinec v. State*, 512 P.2d 563, 568, 571 (Alaska 1973) (restrictive judicial rules on expert testimony adopted elsewhere invade province of trier of fact in condemnation proceedings).

115. See *State v. Doyle*, 735 P.2d 733, 738 n.7 (Alaska 1987).

116. *Id.* at 737.

from sales data known to be strongly influenced by appreciation due to general market conditions.¹¹⁷ In such circumstances, the comparable sales approach may not show any loss in value, as illustrated by the following example.

Assume a property lies within the area impacted by the noise. Its value before the easement is estimated by reviewing sales of comparable properties that occurred before the valuation date. Its post-easement value is estimated by reviewing sales of properties *within* the impacted area that occur sufficiently after the valuation date to allow the market to react to the presence of the easement. These sales must then be discounted or adjusted backward at an appreciation rate (which in "hot" markets may be as much as 1% per month or more)¹¹⁸ for the period of time elapsed between the valuation date and the date of the comparable post-easement sale. This yields "after" values for the parcel adjusted for market appreciation. If the appreciation rate selected is derived from sales data within only the impacted area, a minor loss in value attributable to the easement will not be revealed at all by the sales comparison approach. Consequently, if the "after" sales occurred one year following the imposition of the easement, but property values still appreciated at a rate of 12%, no decline would be indicated from the before to the after value of the subject property unless the easement impact exceeded 12%.

A. The Inside/Outside Justification

In *Doyle*, however, plaintiffs' appraisers were not deterred. According to the limited extract of the testimony in the decision,¹¹⁹ the impacted properties were valued twice — once by using sales of properties outside the impacted area and once by using sales inside the impacted area. The court's recitation of the evidence does not indicate what, if anything, the appraiser did with these two values other than conclude that a parcel inside the impacted area was worth substantially less than its counterpart outside the impacted area.¹²⁰

The *Doyle* court found this testimony sufficient to sustain an award of compensation to the owner of an impacted parcel.¹²¹ But how? The method employed by the landowners' appraisers measured only the difference in value of similar parcels in two different locations.

117. See *id.* at 735.

118. In the years following the date of the taking in *Doyle*, which occurred on Oct. 29, 1980, *id.*, Anchorage realtors believed prices of single-family homes were rising at 18.0%, 12.4% and 10.5% for 1981, 1982 and 1983, respectively. Real Estate Services Corp., 1988-1989 Survey of the Anchorage Real Estate Market (1988).

119. 735 P.2d at 737.

120. *Id.* at 737-38.

121. *Id.* at 738.

Differences in value due to location can result from a myriad of factors, including proximity to amenities and quality and size of improvements within the neighborhood. *Doyle* says nothing about how, if at all, the plaintiffs' appraisers were able to extract the incremental difference in value attributable to the avigation easement from the balance of the difference resulting from the other factors. The opinion offers no explanation of how the appraiser and the superior court could rationally use this information to arrive at the damage amounts awarded. Given the prevalence of the deductive percentage approach, the inference is that the appraisers applied it here to assign some percentage of the locational difference as damage attributable to the easement.

The court quoted the plaintiffs' appraisers to the effect that the sales transactions taken from outside the impacted area were "comparable."¹²² This testimony presumably meant that, in the judgment of the appraisers, these other properties differed only slightly from the subject, which differences could be either ignored or reflected in small adjustments to the actual sale prices. It is therefore possible that differences in value attributable to locational factors and not the avigation easement were handled in this way. If so, then all of the difference in value between parcels within the impacted area and without could at least arguably be attributed to the easement. The court, however, did not address this point.

B. Damages from Diminished Appreciation

After discussing the "inside/outside" testimony, the *Doyle* opinion continues to assert that testimony of a diminished appreciation rate for the subject parcel is related to and supportive of the lower court's finding on damages.¹²³ Plaintiffs' appraisers found an appreciation rate of 13.7% for the subject parcel while unimpacted parcels appreciated at an average rate of 16%.¹²⁴ The court offers no explanation as to how these percentages were translated into the \$488,000 damage award arrived at by the appraisers. The court states only that "trend analysis alone does not indicate the market value of individual properties."¹²⁵ The court concludes by emphasizing testimony that, rather than supporting the award, undermines the whole conclusion of damage: "One appraiser also added that the trend of 13.7% for properties within the subdivision was based on only two sales and re-sales of properties and *thus would not lead to any reliable conclusion*

122. *Id.* at 737.

123. *Id.* at 738.

124. *Id.* The unimpacted parcels had rates of appreciation ranging from 13% to 20%. *Id.*

125. *Id.* at 739.

concerning all the homes in the subdivision.”¹²⁶ Again, despite acknowledging the unreliability of the evidence admitted, the court appears willing to allow an appraiser to leap deductively from any data relating to the property to a conclusion of damage without requiring any objective basis for the appraiser’s findings.

Loss of future appreciation can be valued theoretically at a given point in time. The critical assumption concerns at which point in the future the loss is to be computed. Once this assumption is made, the appraiser can compute the appreciated values of the property with and without the easement. The difference between the two prices represents the loss to the landowner in the future. The amount of compensation for lost appreciation could then be calculated by discounting the loss to the valuation date. But without some meaningful way of estimating the appreciation period, the whole exercise is inherently speculative.¹²⁷

The court could have refrained from employing a “loss of future appreciation” rationale by requiring a simple application of the data to measure plaintiffs’ compensation *as of the date of take*. Adjusting the sales prices of the properties *outside* the impacted area for locational differences other than the avigation easement and discounting them to the date of taking by the *appreciation rate of unimpacted properties* results in values indicative of the value of the subject parcels in the before condition. Discounting the sales of properties *inside* the impacted area *by the same rate* to the same date of take results in values indicative of the value of the subject properties in the after condition.¹²⁸ The difference between the values so indicated would be the amount of just compensation.¹²⁹ If the data, adjusted and discounted

126. *Id.* (emphasis added).

127. The appreciation period might equal the period of time which a “typical” property owner might be expected to hold this type of property before reselling it. At the point of resale, the landowner’s loss of appreciation is translated into a “real,” rather than a “paper,” loss. “Average” holding times, however, are not well documented except possibly for residential properties. For many commercial or industrial properties it simply is not possible to estimate a holding period.

128. The after values estimated in this way might differ from the actual prices of impacted parcels sold near the time of an easement’s imposition. On the date of take, an imperfect distribution of information about the impact of the easement is likely to exist, meaning that the actual price does not reflect the easement’s impact. See *United States ex rel. TVA v. Indian Creek Marble Co.*, 40 F. Supp. 811, 821 (E.D. Tenn. 1941) (stating that the “before and after” method assumes that the “after” price reflects the extent to which the easement limits the use of the servient estate).

129. A mathematical explanation may be clearer to some. Define:

x = value of impacted parcel on date of take
y = value of unimpacted but comparable parcel on date of take
r_i = appreciation rate of impacted parcels
r_u = appreciation rate of unimpacted parcels
S_x = sale price of x at one year after take

in this way, yield no difference in the before and after values of the parcel, there is, to use the *Doyle* formulation, no loss indicated representing "value that would have been realized as of the date of taking, if the taking had not occurred."¹³⁰ Since the superior court in *Doyle* found no diminution in value of the parcels but still awarded damages, application of this analysis on appeal would have required remand or reversal.

C. Inadequate Judicial Process

The court in *Doyle* reiterates its policy followed in previous cases that "considerable latitude must be accorded the trier of fact [in condemnation proceedings] due to the complicated [and inexact] nature of [real] property appraisal."¹³¹ As applied in *Doyle* to an easement take, this policy is tantamount to approval of the receipt by trial courts of

Sy = sale price of y at one year after take adjusted for all differences other than time and easement

Assume:

$S_x = 110$, $S_y = 120$, $r_u = 20\%$

then $S_y = (1 + r_u)y$

and substituting $120 = (1 + .2)y$

$120 = 1.2y$ or $y = 100$.

Since "before" conditions of x assume no easement and since the presence of an easement is the only difference between x and y, $y = 100 = x$ before.

S_x is a sale actually affected by the easement but also affected to some extent by appreciative forces. To remove the effect of such appreciation:

$S_x = (1 + r_u)x$

$110 = (1 + .2)x$

$91.67 = x = x$ after.

Since x as calculated here is affected by the easement but not by appreciation (i.e., discounted to the date of take), it is the value of the parcel in the after condition on the date of take. Thus:

Just Compensation = x before - x after
 $= 100 - 91.67 = 8.33$.

The actual rate of appreciation of impacted parcels need not be known to calculate just compensation but can be calculated:

$S_x = (1 + r_i)x$ or $x = 110/(1 + r_i)$

$S_y = (1 + r_u)y$ or $120 = 1.2y$.

If x and y are comparable then:

$x = y$ and

$120 = 1.2(110/(1 + r_i))$

$100 = 110/(1 + r_i)$ or $1 + r_i = 110/100 = 1.1$

$r_i = .1$.

130. *Doyle*, 735 P.2d at 737.

131. *Id.* at 738 n.7 (quoting *State v. Alaska Continental Bev. Corp.*, 630 P.2d 977, 987 (Alaska 1980)); *Babinec v. State*, 512 P.2d 563, 568, 571 (Alaska 1973); *Ketchikan Cold Storage Co. v. State*, 491 P.2d 143, 151 (Alaska 1971); *Dash v. State*, 491 P.2d 1069, 1076 (Alaska 1971).

appraisals which are unrelated by any rational means to objective market data regarding the property. Because there is a limitless potential for differences of opinion between appraisers for the landowner and appraisers for the condemnor, the potential outcomes in easement condemnation cases are unpredictable. The potentially extreme results, illustrated on the low end by *Scavenius* and on the high end by *Nesbett* and *Doyle*, render it difficult for either party to assess the risks of litigation and provide little middle ground for settlement.

There is, moreover, reason to believe that the judicial task of determining just compensation in easement cases will become even more difficult as a result of the United States Supreme Court's decision in *Loretto v. Teleprompter Manhattan CATV Corp.*¹³² *Teleprompter* involved New York's attempt to require landlords to accept the installation on their buildings of equipment required to provide cable television services to tenants without acquiring easements, by condemnation or otherwise, for such installation.¹³³ Even though the equipment displaced a volume of only about one and a half cubic feet,¹³⁴ the Court held that a compensable taking had occurred.¹³⁵ The slightest physical intrusion by the government, therefore, is potentially of constitutional magnitude and requires a determination of just compensation. The *Teleprompter* decision, however, offers no additional insight into valuation formulae.¹³⁶

A policy of greater judicial scrutiny of appraisal testimony, however, which the *Doyle* court could have followed, also has difficulties. To the extent that the court excludes testimony based on the deductive percentage approach as being speculative or inexpert, results similar to the result in *Scavenius* are encouraged. Such results tend to impair landowner confidence in the condemnation process by giving rise to the paradox described previously.¹³⁷ Encouragement of outcomes which are inadequate from the landowner's perspective is also contrary to the well-established principle favoring a liberal interpretation of constitutional and statutory provisions for the payment of just compensation in condemnation proceedings.¹³⁸ Such outcomes undermine

132. 458 U.S. 419 (1982).

133. *Id.* at 421-25.

134. *Id.* at 433 n.16.

135. *Id.* at 441 ("We affirm the traditional rule that a permanent physical occupation of property is a taking.").

136. The dissent thought, in part, that the matter was something of a tempest in a teapot, anticipating that the compensation awarded after remand would be nominal. *Id.* at 456 n.12 (Blackmun, J., dissenting).

137. See *supra* text at Section V.C.

138. This principle suggests that the landowner's interest in obtaining indemnification for his loss should guide the courts unless a contrary interest of the condemnor clearly indicates some other result. See *DeLisio v. Alaska Superior Court*, 740 P.2d 437, 439-40 (Alaska 1987); *Alsop v. State*, 586 P.2d 1236, 1239 & n.7 (Alaska 1978);

the notion, now reaffirmed by *Teleprompter*, that there has been a taking. It is therefore understandable, in light of this implicit policy, that the court in *Doyle* recoiled from the alternative of zero compensation that was presented by the state.¹³⁹ The case demonstrates, however, the inability of the traditional judicial process to control the arbitrariness in compensation for easement acquisitions that results from the limitations inherent in the available appraisal methods. Any reduction of such arbitrariness must come from other branches of government.

Srb v. Board of County Comm'rs, 43 Colo. App. 14, 18, 601 P.2d 1082, 1085 (Ct. App. 1979), *cert. quashed*, 199 Colo. 496, 618 P.2d 1105 (1980); *Standard Theatres, Inc. v. Department of Transp.*, 118 Wis. 2d 730, 743, 349 N.W.2d 661, 669 (1984). *See also* *Textron, Inc. v. Commissioner of Transp.*, 176 Conn. 264, 268, 407 A.2d 946, 947 (1978) (Just compensation as required by the federal and state constitutions for private property taken for public use means the full, perfect and exact equivalent, in money, for the property taken.); *Ives v. Addison*, 155 Conn. 334, 341, 232 A.2d 311, 314 (1967) (The paramount law intends that the condemnee shall be put in as good condition pecuniarily by just compensation as he would have been in had the property not been taken.); *Housing Auth. of Decatur v. Schroeder*, 113 Ga. App. 432, 434, 148 S.E.2d 188, 190 (Ct. App.), *rev'd*, 222 Ga. 417, 151 S.E.2d 226, *opinion conformed to* 114 Ga. App. 460, 151 S.E.2d 848 (1966) ("Just and adequate compensation means putting the deprived land owner as nearly as possible back in the same monetary position he was in before the seizure occurred."); *King v. State Roads Comm'n*, 298 Md. 80, 84, 467 A.2d 1032, 1034 (1983) (" 'Just compensation' " for the taking of property means the full monetary equivalent of the property taken; the property owner is to be put in the same position monetarily as he would have occupied if his property had not been taken."); *Commissioner of Transp. v. William G. Rohrer, Inc.*, 80 N.J. 462, 467, 404 A.2d 29, 31 (1979) ("The just compensation to which an owner is entitled when his property is taken by eminent domain is regarded in law from the point of view of the owner and not the condemnor."); *Township of Chester v. Department of Transp.*, 495 Pa. 369, 373, 433 A.2d 1353, 1355 (1981) ("The fundamental principle underlying the requirement of 'just compensation' is one of indemnity: a condemnee is entitled to be placed in as good a position pecuniarily as if his property had not been taken.").

139. The court in *Doyle* appears to have assumed that a taking had occurred as a result of the noise. *State v. Doyle*, 735 P.2d 733, 735-36 n.3 (Alaska 1987). The opinion contains no discussion of how the noise impacted the use and enjoyment of the landowner's property which normally is the threshold inquiry for determining whether a taking has occurred. *See United States v. Causby*, 328 U.S. 256, 266 (1946) (flights over private land are not a taking, unless they are so low and so frequent as to a direct and immediate interference with the enjoyment and use of the land); *Davis v. United States*, 295 F.2d 931, 932 (Ct. Cl. 1961). Impairment of market value resulting from government action, standing alone, does not result in a taking. *See Kirby Forest Indus. v. United States*, 467 U.S. 1, 15 (1984).

VII. THE LEGISLATIVE SOLUTION: A REBUTTABLE PRESUMPTION

The fifth amendment to the United States Constitution prohibits the legislative restriction or reduction of compensation due a landowner for a taking.¹⁴⁰ The fifth amendment, however, does not prevent a legislature from providing compensation in addition or supplementary to the compensation to which the landowner would be entitled under the Constitution;¹⁴¹ state constitutions have been similarly construed.¹⁴² The procedural requirements for exercising the power of eminent domain are within the discretion of the legislature, subject only to the due process clauses of the federal and state constitutions.¹⁴³ The only absolute requirements are that the landowner be afforded notice and the opportunity to be heard by a properly constituted tribunal with respect to the amount of compensation to be paid for the property taken.¹⁴⁴

As the foregoing discussion indicates, the means by which a landowner's compensation for an easement acquisition is usually computed hardly constitutes an objective appraisal method. At the same time, however, deeply ingrained notions of fairness and the sanctity of property cause both landowners and fact finders to revolt at the idea that no compensation should be awarded merely because it cannot be systematically calculated. Absent an objective method of determining just compensation, however, damage awards will, as indicated by the Alaska experience, vary widely from case to case. Under the current

140. U.S. CONST. amend. V. *See also* United States v. New River Collieries Co., 262 U.S. 341, 343-44 (1923) ("The ascertainment of compensation is a judicial function and no power exists in any other department of the Government to declare what the compensation shall be or to prescribe any binding rule in that regard."); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325-27 (1893) ("It does not rest with . . . Congress or the legislature . . . to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry."); *Miller v. United States*, 620 F.2d 812, 837 (Ct. Cl. 1980) ("[T]he determination of just compensation under the fifth amendment is exclusively a judicial function.").

141. *See Mitchell v. United States*, 267 U.S. 341, 345-46 (1925); *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 676-77 (1923).

142. *See* cases collected at 3 J. SACKMAN, *supra* note 16, § 8.10[1] n.8.

143. *Crane v. Hahlo*, 258 U.S. 142, 147 (1921); *Port of New York Auth. v. Heming*, 34 N.J. 144, 154, 167 A.2d 609, 614 (1961). The "takings clause" of the fifth amendment is applicable to the states by virtue of the fourteenth amendment. *See, e.g., De Salvo v. Arkansas Louisiana Gas Co.*, 239 F. Supp. 312, 316 (E.D. Ark. 1965).

144. *Boddie v. Connecticut*, 401 U.S. 371, 377-78 (1971); *Goadby v. Philadelphia Elec.*, 504 F. Supp. 812, 817 (E.D. Pa. 1980), *rev'd on other grounds*, 639 F.2d 117 (1981); *Chicago Land Clearance Comm'n v. Darrow*, 12 Ill. 2d 365, 369-70, 146 N.E.2d 1, 4 (1957); *Vinson v. Oklahoma City*, 179 Okla. 590, 593, 66 P.2d 933, 936 (1937); *Elliot v. Clement*, 175 Or. 44, 51-52, 151 P.2d 739, 742 (1944).

system, the probability is high that similarly situated landowners will not be treated alike.

Legislative determination of the appropriate amount of compensation in easement acquisitions can provide the needed uniformity in compensation awards. Legislation, however, that simply provides predetermined awards for each easement acquisition has obvious infirmities. First, to the extent that the landowner can develop appraisal testimony suggesting his actual damages exceed the legislated amount, the legislation would potentially violate the fifth amendment.¹⁴⁵ On the other hand, legislatively mandated compensation that exceeds amounts which can be proven definitively by appraisal is arguably a waste of public resources. Finally, legislation may be considered arbitrary and potentially in violation of the due process clause if it is not in some way tailored to the specific property over which the easement is taken.¹⁴⁶

These objections can be neutralized by adopting a rebuttable presumption that just compensation in an easement acquisition is equal to a stated percentage of the fair market value of the fee interest affected by the easement.¹⁴⁷ While such legislation would not guarantee adequate compensation to the landowner in all cases, it would validate the perception that no taking of a property right, however restricted, can occur without the payment of compensation. The landowner would be entitled to rely upon such a presumption throughout the condemnation proceedings, including trial, which would permit him to generate a fact issue without resort to expensive appraisal testimony.

Presumptively assessing just compensation as a fixed percentage of the fee value in essence constitutes legislative adoption of the deductive percentage appraisal method discussed above.¹⁴⁸ The presumption, however, in contrast to the unsupported subjective opinion of one or more appraisers in a particular case, represents a society's collective judgment as to what is fair in all cases where the evidence does not compellingly suggest otherwise. Since the percentage would not vary across property interests, the legislation would provide uniform compensation to similarly situated landowners. By pegging the award to the fair market value of the land involved, compensation is tailored proportionately to the specific properties subject to the easement. By

145. See *supra* note 140.

146. See generally *Truax v. Corrigan*, 257 U.S. 312, 332 (1921); cases collected at 1A J. SACKMAN, NICHOLS ON EMINENT DOMAIN § 4.12[2] n.19 (P. Rohan rev. 3d ed. 1985 & Supp. 1989).

147. Presumptions in aid of constitutional rights are permissible. See *Usery v. Turner Elkhorn Mining Co.*, 427 U.S. 1, 28-30 (1976); *Keyes v. School Dist. No. 1*, 413 U.S. 189, 210 (1973). As to presumptions generally, see ALASKA R. EVID. 301 and commentary.

148. See text *supra* at Section V.C and notes 102-104.

creating only a presumption and not mandating an award, such a statute preserves the condemnor's opportunity to defeat the presumption by introducing appraisal testimony before the trier of fact.

Such legislation, however, would still be constitutionally questionable if it were to bind the landowner who could otherwise produce evidence that the value of the easement exceeds the amount established by operation of the presumption. Under such circumstances, the presumption would become a substantive rather than a procedural restriction on the landowner's fifth amendment rights and likely would be unconstitutional.¹⁴⁹ This infirmity can be cured by providing the landowner with the right to elect to extinguish the presumption by giving notice before some reasonable point in the condemnation process. Both landowner and condemnor would then proceed to establish just compensation with the trier of fact not being instructed on the presumption.

VIII. CONCLUSION

A proposed statute embodying the elements discussed in the previous section follows in the appendix. Adoption of such a statute would enhance fairness and uniformity in the award of compensation for easement acquisitions. Appraisers would not be pressured to opine that a value impact exists when one cannot be rationally calculated. Landowners and condemnors alike would have a standard in every case against which they could assess their own positions on just compensation. Such a standard would encourage settlement of compensation questions without litigation, to the benefit of both condemnors and landowners. Courts could exercise a healthier skepticism regarding lay and expert valuation testimony that is based on neither rational method nor objective data. While the legislative determination of the appropriate percentage of fee value to impose might be difficult and involve reconciling the desires of conflicting constituencies, the impact of such legislation on the compensation process could only be beneficial.

149. *See supra* note 140.

APPENDIX

Compensation For Easement Takings. Whenever an easement is taken for a public use, it shall be presumed that just compensation for such taking is equal to —% of the fair market value of the fee simple interest in the portion of the parcel of land subject to the easement. Any party with an interest in the compensation to be awarded for such easement acquisition may extinguish the presumption created hereby in any proceeding for the determination of the amount to be paid for the interest by giving written notice to the court and the parties at such reasonable time as may be determined by the court, by rule or otherwise.

